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Supreme Court, U.S.
FILED
OCT 7 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-427

In the Supreme Court of the United States

OCTOBER TERM, 1988

MARK B. HARMON, ET AL., PETITIONERS

v.

RICHARD L. THORNBURGH, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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17 pp

QUESTION PRESENTED

Whether the Department of Justice's "Drug Free Workplace Plan" for the Department's Offices, Boards, and Litigating Divisions violates the Fourth Amendment because it is purportedly unlikely to reveal evidence of work-related drug use and because urinalysis testing cannot dispositively establish on-the-job drug impairment.

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OPINION BELOW

The opinion of the district court (Pet. App. 1a-12a) is not yet reported.

JURISDICTION

The judgment of the district court granting petitioners' request for a preliminary injunction was entered on July 29, 1988 (Pet. App. 13a), and a judgment making that injunction permanent was entered on that same date (Pet. App. 15a). A notice of appeal was filed by respondents on August 5, 1988 (Pet. App. 19a), and the case was docketed in the court of appeals on August 11, 1988 (Pet. App. 21a).

The petition for a writ of certiorari before judgment was filed on September 8, 1988. The jurisdiction of this Court rests on 28 U.S.C. 1254(1) and 2101(e).

STATEMENT

A. The Department of Justice Drug-Testing Program

1. On September 25, 1987, after more than a year of study, the Department of Justice announced the Department of Justice Drug-Free Workplace Plan (Pet. App. 33a-66a). In order to eliminate illegal drug use from the Department's workplace, while at the same time assuring employees that "personal dignity and privacy [would] be respected" in so doing (*id.* at 36a), the Plan set forth a multifaceted program for (1) employee assistance in obtaining treatment and counseling for drug abuse problems; (2) supervisory training in detecting and dealing with drug problems; (3) employee education on the dangers of illegal drugs; and (4) identification of illegal drug use through the use of drug testing on a carefully monitored basis (*ibid.*).

Thereafter, on December 15, 1987, the Department issued its Drug-Free Workplace Plan for its Offices, Boards, and Litigating Divisions ("OBDs") (Pet. App. 67a-84a).[1] The OBD Plan authorizes urinalysis drug testing when there is "reasonable suspicion" of illegal drug use based upon documented, objective

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[1] The Department components that are included in the OBD Plan are listed at Pet. App. 67a-68a. Several Department components have separate drug programs, and thus are not included in the OBD Plan. Those include the Immigration and Naturalization Service, the Drug Enforcement Administration, the Federal Bureau of Investigation, the United States Marshals Service, and the Bureau of Prisons.

facts (Pet. App. 74a-75a); when an employee is involved in an accident or unsafe practice (*id.* at 76a-77a); as part of a follow-up to successful completion of drug rehabilitation through the Department's Employee Assistance Program (*id.* at 77a); or as part of a limited random testing program (*id.* at 74a).

2. The random drug-testing program under the OBD Plan applies only to employees who hold certain specified sensitive positions. They include (1) employees authorized to have access to top secret classified information; (2) attorneys responsible for conducting grand jury proceedings and personnel who assist them; (3) high-level officials serving under Presidential appointments; (4) attorneys whose duties include the prosecution of criminal cases; and (5) attorneys and other employees whose duties include maintaining, storing, or safeguarding a controlled substance. Pet. App. 73a.[2] The procedures for sample collection and urinalysis incorporate (see *id.* at 57a, 74a) the requirements set forth in the Department of Health and Human Services (HHS) regulations governing all federal employee drug-testing programs. See *Mandatory Guidelines for Federal Workplace Drug Testing Programs*, 53 Fed. Reg. 11979 (Apr. 11, 1988) [hereinafter HHS Reg.]

An employee who has been selected for random testing is met at the collection site and presents a

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[2] Petitioners' description (Pet. 3-6) of the DOJ Plan is not entirely accurate, since it appears to be based on materials that have been superseded. For example, although petitioners indicate (Pet. 4) that the Plan covers all Assistants to the Solicitor General, the Plan in fact covers only the two Assistants in that office who have clearances at the Top Secret level or higher.

photo identification (Pet. App. 4a; HHS Reg. § 2.2(f)(2)). When the actual testing begins, the employee will be asked to remove his outer garments (such as coats and jackets) and to wash his hands (Pet. App. 4a; HHS Reg. § 2.2(f)(4)). The employee will then be directed to a closed rest room stall where the specimen is to be provided (Pet. App. 4a; HHS Reg. § 2.2(f)(7)). Direct observation by the collection monitor is permitted only where there is reason to believe that the particular individual may attempt to alter or substitute a sample (Pet. App. 4a; HHS Reg. § 2.2(f)(16)).

After the sample is taken, the collection monitor, in the presence of the employee, transfers the sample to a specimen bottle and measures its temperature to make sure the sample has not been altered or substituted (Pet. App. 4a-5a; HHS Reg. § 2.2(f)(12)). An identification label, bearing the employee's fingerprint, his identification number and the date, is then placed around the bottle, and a tamper-proof custody seal is taped over the top and down the sides. The employee signs a log book, which the collector also initials, and a chain-of-custody form is prepared to follow the specimen. The sample is then placed in a tightly sealed container and sent to the laboratory for analysis (Pet. App. 5a; HHS Reg. § 2.2(f)(19), (20), (24), (25), (g), and (h)).

The laboratory to which the samples are submitted must be managed by an individual who is either certified as a laboratory director in forensic or clinical laboratory toxicology, or who has a Ph.D. in one of the natural sciences, or who has training and experience comparable to a Ph.D. in one of the natural sciences (HHS Reg. § 2.3(a(1) and (2)). This individual must have experience in "analysis of bio-

logical materials for drugs of abuse" (*id.* § 2.3(a)(2)(iv)). The laboratories must maintain a security system (*id.* § 2.4(a)(1)) and follow detailed chain-of-custody procedures (*id.* § 2.4(a)(2)). The Secretary of HHS, as well as the Department of Justice itself, has the right to inspect the laboratory at any time (*id.* § 2.4(a)(1)), and the laboratory must maintain and make available, for at least two years, documents on all aspects of the testing process (*id.* § 2.4(m)). In addition, the regulations set forth elaborate quality assurance and control procedures (*id.* § 2.5), including thorough use of blind samples (*id.* § 2.5(d)).[3] They also prescribe standards for laboratory filing systems (*id.* § 2.3(f)), training (*id.* § 2.3(e)), refrigerated storage of specimens (*id.* § 2.4(c) and (h)), and reporting of results (*id.* § 2.4(g)).

Once the samples are submitted to the laboratory, they are analyzed for the presence of marijuana (cannabinoids), cocaine, opiates, amphetamines, and

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[3] To be certified to perform drug-testing for federal agencies, a laboratory is subjected to a performance test, requiring it to test three cycles of blind samples over a period of at least three months (HHS Reg. §§ 3.17, 3.18). A single false positive result during this initial performance assessment "will automatically disqualify a laboratory from further consideration" (*id.* § 3.19(a)(1)). During the first 90 days following the certification of a laboratory, the agency must submit to the lab "blind performance test specimens * * * in the amount of at least 50 percent of the total number of samples submitted (up to a maximum of 500 samples) and thereafter a minimum of 10 percent of all samples (to a maximum of 250) submitted per quarter" (*id.* § 2.5(d)(2)). After certification, laboratories must continue to be "challenged" every other month with a set of at least ten specimens (*id.* § 3.17(c)).

phencyclidine (Pet. App. 74a). "In response to concern that specimens may be misused to test for physiological states other than drug abuse (e.g., pregnancy)" (53 Fed. Reg. 11975 (1988)), HHS Reg. § 2.1(c) expressly provides that urine specimens "shall be used only to test for those drugs included in agency drug-free workplace plans and may not be used to conduct any other analysis or test unless otherwise authorized by law." Two tests are conducted on the samples. There is an initial screening test that uses the Radio-Immuno-Assay technique (Pet. App. 5a; HHS Reg. § 2.4(e)(1)). Any specimen that is identified as positive on the initial test must then be confirmed using gas chromatography/mass spectrometry (GC/MS) (Pet. App. 5a; HHS Reg. § 2.4(f)(1)). No sample is considered to be positive unless it is positive on the GC/MS test (HHS Reg. § 2.4(g)(2)), "which is the most reliable indicator of the presence of drug metabolites in urine (Pet. App. 5a).

After the samples have been analyzed, the laboratory reports its results to a "Medical Review Officer," who must be "[a] licensed physician * * * who has knowledge of substance abuse disorders and has appropriate medical training to interpret and evaluate an individual's positive test result together with his or her medical history and any other relevant biomedical information" (HHS Reg. §§ 1.2, 2.4(g)). The Medical Review Officer must "review and interpret positive test results" before any such results may be transmitted to the Department (*id.* § 2.7(a) and (b)). The Medical Review Officer must examine "alternate medical explanations for any positive test result"; in doing so, he may interview the employee, review the employee's medical records, or consider other biomedical factors (*id.* § 2.7(b)). Before veri-

fying a positive test result, the Medical Review Officer must offer the employee an opportunity to discuss the result (*id.* § 2.7(c)). The Medical Review Officer may also order a reanalysis of the original sample "[s]hould any question arise as to the accuracy or validity of a positive test result" (*id.* § 2.7(e)). After verifying the positive result, the Medical Review Officer transmits it to the Department.

3. On June 27, 1988, employees in the OBDs were given notices explaining that the DOJ drug-testing program would go into effect in 60 days (see Pet. App. 2a, 90a-97a). The notice contained a booklet, explaining to employees the nature and purposes of the drug-testing program. Employees who are subject to random drug testing also will receive an individual notice prior to the initiation of random testing (*id.* at 44a-45a).

B. The Present Controversy

1. Petitioners, who are 42 Department employees, including 38 attorneys, three paralegals, and one economist, brought this action in the District Court, seeking, inter alia, to enjoin the Department from implementing the OBD drug-testing program. All but one of the petitioners hold positions that entitle them to conduct grand jury investigations, to prosecute criminal cases, or to receive top secret classified information.[4]

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[4] One of the petitioners, David Orbach, an attorney in the Commercial Litigation Branch of the Civil Division, does not appear to fit into any of those categories, and we do not know of any reason at this time why he would be subject to random testing.

2. On July 29, 1988, the district court granted petitioners' motion for a preliminary injunction (Pet. App. 1a-12a), and on the same date, on respondents' application, entered an order making that injunction permanent (*id.* at 15a). The court recognized that "drug abuse by federal employees is intolerable" (*id.* at 5a), but it found that the Department's plan "to eradicate drugs from the federal workplace" (*ibid.*) was an unreasonable search within the meaning of the Fourth Amendment. It first found (*id.* at 6a) that the Plan was not "justified at its inception" because "it is highly unlikely that compulsory random urinalysis drug testing of otherwise trusted and apparently law-abiding employees would turn up evidence of work-related drug use." Moreover, the court explained, "[b]ecause 'strong privacy interests are involved,'" there must be a showing of compelling need to justify a testing program that does not require individualized suspicion (*id.* at 7a-8a). The court could find no such need in the present case, rejecting respondents' contentions that the Department's interests in the integrity, efficiency, and reputation of its employees were sufficient to justify the OBD drug plan. In particular, the court stated (*id.* at 8a), "there is no nexus between fitness for duty, security and integrity on the one hand, and compulsory random urinalysis drug testing on the other, where no drug problem is believed to exist." The court explained further that the Department's interest in its employees' fitness for duty was "severely weakened by the fact that urinalysis does not measure an employee's current impairment" (*id.* at 9a). And because the court perceived no evidence of an existing drug problem within the Department, it also rejected as insubstan-

tial (*id.* at 10a) respondents' interests in deterring illegal drug use by employees, maintaining the security of classified information, and ensuring the public reputation of the Department.

ARGUMENT

Certiorari before judgment is an "extremely rare occurrence" (*Coleman* v. *PACCAR, Inc.*, 424 U.S. 1301, 1304 n.* (1976) (Rehnquist, J.)). This "extraordinary" power (*Ohio* v. *Price*, 360 U.S. 246, 247 n.1 (1959) (Brennan, J.)) is reserved exclusively for those issues of "public importance" that require "prompt resolution" by this Court (*United States* v. *Nixon*, 418 U.S. 683, 687 (1974)). Supreme Court Rule 18 summarizes those stringent requirements, providing that certiorari before judgment is available only "upon a showing that the case is of such imperative public importance as to justify the deviation from normal appellate practice and to require immediate settlement in this Court." For several reasons, the present case does not satisfy that exacting standard.

First and foremost, the case does not require "immediate settlement in this Court" (Rule 18). Petitioners were the prevailing parties in the district court, having secured a permanent injunction against the commencement of the Department's random drug-testing program. Respondents have not sought a stay of that judgment from the court of appeals. Thus, under the status quo, petitioners have achieved a full measure of litigation success, and run no risk of being subjected to random drug-testing during the pendency of the litigation in the court of appeals. Moreover, as prevailing parties, petitioners are not normally entitled to petition this Court for a writ

of certiorari. See *California* v. *Rooney*, No. 85-1835 (June 23, 1987) (per curiam). There is no reason to depart from that rule in this case.

Second and relatedly, the present case does not demand "immediate" review by this Court because it is already scheduled for expedited consideration by the court of appeals. Pursuant to the court of appeals' scheduling order, briefing of the case must be completed by November 28, 1988, and oral argument will be held on December 15, 1988. Thus, even were this Court to accept petitioners' suggestion (Pet. 18) for expedited briefing, the case would not likely be considered by this Court earlier than the date already set for argument in the court of appeals. Petitioners offer no reason to pretermit the court of appeals' review.

Third, while there may some day be a "need for a ruling from this Court" (Pet. 13) on the general issue of random drug-testing, there is surely no need for such a ruling in this case at this time. To the contrary, the Court is presently scheduled to hear argument on November 2, 1988, in two cases raising broad questions about drug and alcohol testing under the Fourth Amendment: *National Treasury Employees Union* v. *von Raab*, No. 86-1879; and *Burnley* v. *Railway Labor Executives' Ass'n*, No. 87-1555. While, in some respects, those cases involve different testing programs, the issues involved are, as petitioners acknowledge (Pet. 18), "closely related" to those raised in present case, and there is every reason to believe, as the district court concluded (Pet. App. 11a), that the Court's disposition of those cases "will likely control the ultimate disposition of this case." Petitioners do not explain why the court of appeals cannot be trusted to apply this Court's deci-

sions faithfully, possibly obviating the need for further review by this Court.

Fourth, even were there a reason to decide questions about random drug-testing at this time, this case is not the most appropriate vehicle for doing so. There are at present several random drug-testing cases now before the courts of appeals, each of which poses essentially the same issues as this case. See, *e.g.*, *AFGE* v. *Dole*, 670 F. Supp. 445 (D.D.C. 1987), appeal docketed, No. 87-5117 (D.C. Cir. Dec. 11, 1987) (air traffic controllers and other Department of Transportation employees) (appeal pending; oral argument scheduled for October 18, 1988); *National Fed'n of Fed. Employees* v. *Carlucci*, 680 F. Supp. 416 (D.D.C. 1988), appeal docketed, No. 88-5080 (D.C. Cir. Mar. 16, 1988) (Army aviation employees, guards and police, and other officials in sensitive positions) (appeal pending; oral argument scheduled for October 18, 1988); *AFGE* v. *Thornburgh*, No. 88-2841 (9th Cir.) (Bureau of Prisons employees) (appeal pending). Petitioners themselves recognize (Pet. 18) that it would be helpful to have the views of the courts in these and other cases should the Court take up the issue of random drug-testing. But unlike the present case, further review in any of these other cases would offer the Court "the substantial value inherent in an intermediate consideration of the issue by the Court of Appeals." *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 937, 938 (1952) (Burton, J., dissenting from grant of certiorari before judgment).

Finally, although the questions posed by random drug-testing may well be of "public importance" (Pet. 13), they are not, in the present context, of the same commanding significance as the issues that this

Court has traditionally reviewed by a grant of certiorari before judgment. Thus, this case presents none of the recurring circumstances in which the Court has seen fit to exercise this extraordinary power: cases involving challenges to the constitutionality of a federal statute,[5] pressing questions of foreign policy,[6] or the need for immediate action to protect the Court's own institutional authority.[7] See generally Lindgren & Marshall, *The Supreme Court's Extraordinary Power to Grant Certiorari Before Judgment in the Court of Appeals*, 1986 Sup. Ct. Rev. 259, 288-297.

Apart from all else, we believe that the petition in this case betrays a disturbing perspective on the work of this Court, of the courts of appeals, and of the judiciary in general. At bottom, petitioners' proposal amounts to the assertion that because this Court will almost certainly reach the issue of random drug-testing eventually, and because it has the ultimate authority to decide that issue, it might as well get it over with and vote now. But that overlooks the fact that litigation—especially litigation involving is-

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[5] See *United States* v. *Mistretta*, No. 87-1904 (June 30, 1988); *Carter* v. *Carter Coal*, 298 U.S. 238 (1936); *Railroad Retirement Board* v. *Alton R.R.*, 295 U.S. 330 (1935).

[6] See *Dames & Moore* v. *Regan*, 453 U.S. 654 (1981); *Wilson* v. *Girard*, 354 U.S. 524 (1957); *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952); *Cincinnati Soap* v. *United States*, 301 U.S. 308 (1937); *Ex parte Quirin*, 317 U.S. 1 (1942); *United States* v. *United States Mine Workers*, 330 U.S. 258 (1947); *The Three Friends*, 166 U.S. 1 (1897).

[7] *See United States* v. *Nixon*, 418 U.S. 683 (1974); *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952); *United States* v. *United States Mine Workers*, 330 U.S. 258 (1947).

sues of significant public importance—is a deliberative process. The two drug-testing cases now before the Court, *Burnley* and *von Raab*, will very likely influence the disposition of this case by the court of appeals. And the way in which the courts of appeals respond to whatever this Court decides in *Burnley* and *von Raab* may influence any decision that this Court ultimately renders on the issue of random drug-testing. But that is hardly a failure of process; rather, it is precisely how one hopes wisdom is achieved. Petitioners' argument in the end amounts to a demonstration why in all but the most unusual cases—a category that Congress only last year drastically reduced by eliminating most types of direct appeals to this Court—the regular judicial process should be allowed to run its course.

CONCLUSION

The petition for a writ of certiorari before judgment should be denied.

Respectfully submitted.

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OCTOBER 1988

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